No. 22,376

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

FOOD EMPLOYERS COUNCIL, INC. and RETAIL CLERKS UNION, LOCAL 770,

Respondents.

Petition for Enforcement and Cross-Petition for Review of an Order of the National Labor Relations Board.

BRIEF FOR RESPONDENT UNION, RETAIL CLERKS UNION, LOCAL 770.

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Respondents.

Petition for Enforcement and Cross-Petition for Review of an Order of the National Labor Relations Board.

BRIEF FOR RESPONDENT UNION, RETAIL CLERKS UNION, LOCAL 770.

Jurisdiction.

This case is before the Court upon the petition of the National Labor Relations Board, pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Section 151, *et seq.*), for enforcement of its order, issued on March 15, 1967, and cross-application for review of such order, pursuant to Section 10(f) of the National Labor Relations Act, as amended, against respondents, Food Employers Council, Inc., and Retail Clerks Union, Local 770. The Board's Decision and

Order are reported at 163 NLRB, No. 58. This Court has jurisdiction, in that the alleged unfair labor practices occurred within this judicial circuit. No jurisdictional issue is presented.

Counterstatement of the Case.

Respondent Union incorporates herein as if fully set forth petitioner's Statement of the Case, with the exception of that portion which relates to the extension by the Food Employers Council and respondent Union of their 1964-69 contract to snack bar employees. At the time the contract was executed, respondent Union represented a majority of employees in the appropriate unit, which included snack bar employees. Respondent Union has at no time distinguished between snack bar employees and other employees included within its bargaining unit, with the exceptions noted in G.C. Ex. 3, *i.e.,* those employees represented by other Unions [Tr. 90, 94, 115].

ARGUMENT.

The Board Improperly Found That Respondent Counsel and Respondent Union Violated Sections 8(a)(1), (2) and (3) and 8(b)(1)(A) and (2) of the Act, Respectively, by Applying the Terms and Conditions of Their 1964-1969 Collective Bargaining Agreement to the Employer's Snack Bar Employees.

Respondent Union urges that the Board unreasonably refused to regard the Employer's snack bar employees (not covered by a contract with the Culinary Workers Union) as an accretion to the existing Retail Clerks' unit, and therefore, that the extension of recognition by respondent Council to the Retail Clerks did not violate Sections 8(a)(1) and (2), with respect to the Council and 8(b)(1)(A) and (2) of the Act, with respect to the Union.

The Board exceeded its authority and abused its discretion by its finding that, upon the application of the relevant criteria, the Employers' snack bar employees are not properly an accretion to the Clerks' bargaining unit, in that the terms and conditions of their employment are different from those of the Retail Clerks and that they have a community of interest apart from them.

Contrary to the contention of the Board, these findings are not supported by the record. The Board cites the *Piggly-Wiggly California Co.* case, 144 NLRB 708, in support of this assertion. However, that case pertained to a set of facts wholly different from those of the instant case, and is therefore, inapposite with regard to the issues in the case presently before this Court. In the *Piggly-Wiggly* case, the petitioner, Culinary Workers, Local 694, sought to represent a unit

composed of the snack bar employees of the Encino store of the Employer. The Retail Clerks, intervenor therein, asserted that its then current contract with the multi-employer bargaining unit covered snack bar employees of Piggly-Wiggly and all other members of the multi-employer unit; and in the alternative, that the unit sought by the Culinary Workers was inappropriate in that it ought to be co-extensive with the Employers' two stores, if not the entire multi-employer unit, and, because of a mutuality of interest, the snack bar employees were properly part of the Retail Clerks' unit.

The Board found that there was no intention that the contract between the Retail Clerks and the Food Employers' Council cover snack bar employees, and thus, there was no history of overall bargaining for snack bar employees on a multi-employer basis. Therefore, on the basis of the evidence presented, the single store unit of snack bar employees was found to be appropriate.

However, in circumstances where no labor organization seeks to represent such a unit separately, a storewide unit may constitute an appropriate unit in conformance with long-established Board policy. Such policy, as applied to retail department stores, which are analogous for all intents and purposes to retail food markets, is expressed in a number of cases. See, *e.g.*, *Stern's Paramus*, 150 NLRB 799, 803; *J. W. Mays, Inc.*, 147 NLRB 968, 972; *Polk Bros., Inc.*, 128 NLRB 330, 331; *May Department Stores Co., Kaufmann Div.*, 97 NLRB 1007, 1008. Under this policy, the Board has treated a retail department store as a "plant unit" within the meaning of Section 9 of the Act, *supra*.

The Board has long recognized the presumptive appropriateness of the single-plant unit. *Beaumont Forg-*

ing Co., 110 NLRB 2200, 2201-2202; *Fredrickson Motor Express Corp.,* 121 NLRB 32, 33; *Temco Aircraft Corp.,* 121 NLRB 1085, 1088, n. 11; *Dixie Belle Mills, Inc.,* 139 NLRB 629, 631; *Liebmann Breweries, Inc.,* 142 NLRB 121, 125. See also, *e.g., NLRB v. Schill Steel Products,* 340 F. 2d 568, 574 (C.A. 5); *Sav-On Drugs, Inc.,* 138 NLRB 1032, 1033.

Thus, while a fraction of a store-wide unit, such as the snack bar employees herein, might itself constitute an appropriate bargaining unit, this does not detract from the validity of the broader unit, which is also an appropriate unit. *NLRB v. Smith,* 209 F. 2d 905, 907 (C.A. 9); *Foreman & Clark, Inc. v. NLRB,* 215 F. 2d 396, 405 (C.A. 9); cert den. 348 U.S. 887; *NLRB v. Quaker City Life Insurance Co.,* 319 F. 2d 690, 693 (C.A. 4); *Mountain States Telephone & Telegraph Co. v. NLRB,* 310 F. 2d 478, 480 (C.A. 10); cert. den. 371 U.S. 875; *NLRB v. Charles Smyth, et al.,* 212 F. 2d 664, 667-668 (C.A. 5); *Harris Langenberg & Co. v. NLRB,* 216 F. 2d 146, 148 (C.A. 8); *Mueller Brass Co. NLRB,* 180 F. 2d 402, 405 (C.A.D.C.).

Indeed, it is implicit in the Board's decision in the *Piggly-Wiggly* case, *supra,* that a store-wide unit in a retail food store involving snack bar employees may be appropriate. One of the predicates upon which the Board decided that case was its finding that no showing was made that the Retail Clerks Union and the Food Employers Council intended their contract apply to snack bar employees.

The decision of the Trial Examiner of the NLRB in the *Boys Markets, Inc.* Case, 156 NLRB, No. 6, discusses in great detail the course of negotiations between the Retail Clerks Union and the Food Employers Council

with regard to coverage of snack bar employees in the contract which ultimately was entered into for the period of April 1, 1964 through March 31, 1969. That contract most definitely spells out the parties' intention that it cover all snack bar employees of the Employer-members of the Council, except those already represented by the Culinary Workers Union.

On the other hand, the Culinary Workers Union in this case makes no claim whatsoever to represent any of the snack bar employees of the respective Employer parties herein.

Based on the foregoing, respondent Union contends that the unit set forth in the contract is appropriate, and that the requisite criteria for accretion are established herein. This assertion is founded on the following factors:

1. Snack bars are an integral and wholly related part of the markets' overall operations, involving the retail selling of food, groceries, and merchandise. Such markets are generally members of chain operations, and have common control of labor relations policies emanating from the central administrative office of the markets. The markets collectively bargain with the representatives of their employees on a multi-employer basis through the Food Employers' Council.

2. The snack bars sell food for both on-premises and off-premises consumption. Insofar as food sold for off-premises consumption is concerned, this service is wholly analogous to the function performed by all other areas of the market selling food, groceries, and general merchandise to the retail public for off-premises consumption. With regard to those food items sold for on-premises consumption, it is clear that this is an ad-

junct service, designed to attract customers to the markets.

3. It is conceded that the charging parties may have an historical interest in restaurants, but the nature of these operations as developed in the record demonstrates that snack bars are neither restaurants, nor generally comparable to restaurants. In some cases snack bars provide tables and chairs where customers may sit down and eat their food; however, in many cases there are no such facilities and food purchased at the snack bar must be consumed either off the premises or standing up at the counter. Food products sold at the snack bar are taken from other sections of the markets [Tr. 147].

4. Snack bars are located within the "four walls" of the market, generally immediately outside the checkstands, very much like liquor departments, whose clerks are members of the respondent Union [Tr. 75].

5. That the snack bar employees have a community of interest with other store employees in the Retail Clerks unit is demonstrated by the following facts:

(a) All employees observe the same hours [Tr. 76];

(b) All employees observe the same lunch hours [Tr. 76];

(c) All store employees have common supervision, in that each store has a single overall store manager responsible for the operations of each department, including the snack bar. Where a snack bar may have a manager, he is not a supervisor within the meaning of the Act, and therefore, the factor of common supervision is not thereby negated [Tr. 77];

(d) The snack bar manager performs functions similar to those of the managers of the other departments, such as grocery, produce, and meat, which managers do not have the power to hire or fire, and which departments do not constitute separate units [Tr. 105].

(e) There are occasional interchanges of employees, where clerks, clerks' helpers, or boxboys do snack bar work. Such employers under the Clerks' contract, ". . . do whatever services that are needed to be preformed while they are there." [Tr. 143];

(f) Snack bar employees occasionally transfer to other jobs in the stores [Tr. 130]. The terms and conditions of the employment of snack bar employees are identical to those of other employees in the store with regard to wages, hours, working conditions, and fringe benefits. Insofar as snack bar employees receive meals, the cost of such meals is deducted from their paychecks [Tr. 76-77].

(g) The same bulletin board applies to the snack bar employees and all other employees in the store [Tr. 105];

(h) All employees in the store have similar duties, in that all use cash registers and deal with the public in a sales capacity [Tr. 75].

In sum, snack bar employees and the other employees covered by the contract with the Retail Clerks Union have common interests, common supervision, common places of work, and common working conditions. In applying the tests to determine whether accretion is proper, as normally applied by the Board, the following should be noted: Separate administrative units do not exist, the snack bar employees work within the "four

walls" of the store, so that there is no question of geographical distance between the groups of employees involved; there is significant and substantial similarity of contractual conditions governing the groups of workers; and, some interchange of employees takes place, thus demonstrating a sufficient community of interest between the existing unit and the new group of employees to justify their accretion to the Retail Clerks' unit.

Strikingly in point here is the case of *Safeway Stores, Inc. and Local 37, Bakery and Confectionary Workers International Union of America,* 137 NLRB, No. 187, 50 LRRM 1481 (1962). In that case, the petitioning Union sought to represent a unit of in-store bakers employed in certain of the Employers' retail food stores in California. Retail Clerks Locals 899 and 770, intervenors therein, contended that the in-store bakers should be included in the existing multi-store units currently represented by those Locals as an accretion thereto.

These bakery shops were established in 1961 at three of the approximately 200 stores of the Employer in the greater Los Angeles area. The bakery shops were partitioned off from the bakery selling areas of the stores, and had ovens which were installed in such a manner as to afford customers a full view of the products being baked. The in-store bakers were initially hired as bakers, and were required to have some prior experience as bakers.

The Board found that they did not perform all of the functions customarily associated with that trade, and delineated the differences between their functions and those of bakers as they were normally understood. The

Board found that the in-store bakers thawed frozen dough and pre-baked products, and baked and decorated them as required; prepared icings, cream puffs, and eclairs, and prepared products from instant mixes. As part of their regular duties, the in-store bakers were found to have spent about 25% of their time in the selling areas within the bakery department. The Board further found that, except for differences in starting time, the bakers had essentially the same working hours and other conditions of employment as the other store employees in the Retail Clerks unit. Further, the Board found that the bakers, like all store employees, worked under direct supervision of the store manager.

The Board stated, finally, that

> "in all the circumstances of this case, including the fact that the in-store bakers do not exercise the full gamut of skills usually associated with the bakers' trade . . . we find that the four in-store bakers constitute an integral part of the operating personnel of the respective stores, whose employees are currently represented by the Intervenors as part of the existing multi-store units and are an accretion to such units."

The petition was, therefore, dismissed.

The analogy between *Safeway, supra,* and the instant case is manifest. These bakers were required to possess many of the skills of a distinct trade and did so; they spent no more than 25% of their time in selling activities; they worked in an area of the store no less distinct than the snack bars.

Notwithstanding these distinctions from other workers in the Clerks' unit, the Board found that they were

so integral a part of the operating personnel of the market as to preclude them from being a separate appropriate unit and to require their accretion to the existing Clerks' unit.

It is contended by respondent Union that the Board's decision in *Safeway* is correct, and that proper application of the standards therein applied compels a similar finding in the instant case; that is, the snack bar employees do constitute an accretion to the existing Clerks' unit, and for the Board to find to the contrary, as it has herein, is an abuse of its discretion.

See also, *Priced Less Discount Foods, Inc.,* 157 NLRB, No. 95, where the Retail Clerks requested a unit of all grocery employees, excluding meat department employees and delicatessen employees. The Board found that a separate unit of grocery employees, excluding meat department employees, was appropriate; however, it required that the delicatessen department employees must be included in the unit sought by the Clerks. Respondent Union also relies upon the case of *The Great A & P Tea Co.,* 140 NLRB 1011, where a "family savings department," in which small and large appliances were sold, was considered an accretion to the unit already represented by the Retail Clerks in that particular market.

In arguing that the Board did not abuse its discretion and exceed its authority in its Decision and Order herein, the General Counsel relies on the case of *Local 620, Allied Industrial Workers v. NLRB,* 375 F. 2d 707, 64 LRRM 2828 (CA. 6), among others. Respondent Union respectfully contends that reliance upon that case misconceives the essential question in the instant case and is therefore inapposite.

In that case, the question before the Court was whether

> "the boundries of the valid bargaining unit can be contractually extended by an Employer and Union to cover employees at a distant plant who never indicated their support of that Union." 64 LRRM, at 2831.

It is contended that the instant case is one where an appropriate unit was already in existence, and where the Board attempted to bypass the procedural requirements of Section 9(c) of the Act (which allows dissatisfied minority employees to seek separate representation) by holding that a new operating division within the unit did not constitute an accretion thereto. Respondent Union contends that this case is analogous to *NLRB v. Illinois Malleable Iron Co.*, 296 F. 2d 202, 49 LRRM 2103 (C. A. 7, 1961). First, as in the *Malleable* case, *supra*, this is not a representation case designed to determine prospective rights and obligations. It is, rather, an adjudication of the lawfulness of the past conduct of respondent Union and the respondent Employers.

In *Malleable*, the Employer, Appleton Electric Co., purchased the plant and other assets of Illinois Malleable Iron Co. when that company ceased operations. Appleton proceeded to integrate this new plant into its existing Chicago operations, for which operations it had entered into a collective bargaining agreement with Local 1031 of the International Brotherhood of Electrical Workers. Pursuant to that contract, which included a union security agreement employees at this newly acquired facility were required to join Local 1031. The National Labor Relations Board held that it was improper for these employees to be accreted to the ex-

isting bargaining unit, and ordered Appleton to cease and desist from unlawfully assisting Local 1031 by recognizing that Union as the bargaining representative of employees of the Malleable facility unless and until the Union had been certified as their bargaining representative. The Seventh Circuit denied the Board's petition for enforcement of its order, finding that there was an appropriate unit in existence and that the union security contract covering Appleton and Local 1031 was valid. The court stated significantly, 49 LRRM, at 2016:

> "To prohibit the inclusion of non-consenting minorities in the first instance in an appropriate larger unit before a question of representation has been raised is to refashion the statutory scheme.
>
> "The Board's attempt to make illegal the inclusion of prospective employees of after-acquired plants and divisions would seem to be contrary to a basic policy of the Act, to-wit: to achieve stability of labor relations." (Citation omitted).

The Court goes on to say:

> "We have herein an appropriate unit. In addition, the union security contract with Appleton was a valid contract. Of course, the Board has no power to reform the contract directly nor by indirection through the provisions of an order of the Board.
>
> "Neither the dues reimbursement remedy nor the Board's sweeping order can stand in the face of the employees participating in a contract negotiated in good faith with an undominated Union.
>
> "We think member Bean well stated the situation confronting Appleton when he said in his dis-

> senting opinion, '. . . Moreover, the agreement expressly provided that it should extend to plants thereafter acquired in the Chicago area. Appleton was thus faced with the alternative of applying, or refusing to apply, the agreement to the small group of new employees. It chose the alternative of honoring the agreement—a choice it made in good faith so far as the record shows. Accordingly it required the new employees to comply with lawful Union security provisions of the agreement.' "

This is almost precisely the case herein. Effective April 1, 1964, respondent Union and the Food Employers' Council entered into a collective bargaining agreement [G.C. Ex. 3], which provided that employees of the snack bars of the markets in the multi-employer unit would henceforth be covered by the collective bargaining agreement, and established wage rates and working conditions for those employees. That contract purported to cover all employees of the respective markets except those specifically excluded, which exclusions pertained to the employees of the meat department, and the janitors, both of whom were represented by other Unions, and employees working in snack bars who were already represented by the Culinary Workers Union, which recognized that the Culinary Workers had organized these employees at some of the member markets of the Food Employers' Council.

No reference was made to snack bar employees in the prior collective bargaining agreement between the Food Employers' Council and respondent Union. Since there was no bargaining history with respect to these employees, and on specific facts of the particular cases, a unit of snack bar employees at the Encino store of Piggly-Wiggly California Co. was found by the Board

to be appropriate, as were units of snack bar employees at stores of Boys Markets and Vons Grocery Company, respectively, in the Los Angeles area. (*Piggly-Wiggly California Co., supra, Boys Markets, Inc., supra.*) In each of those cases, the Culinary Workers Union had organized the employees of the snack bars; in the *Piggly-Wiggly* case the Board found that the Clerks and the Food Employers' Council did not intend their agreement to encompass those employees, while in the *Boys* case, the Culinary Workers Union had organized the snack bar employees during the time that the Food Employers' Council and respondent Union were negotiating for the inclusion of those employees in a multi-employer bargaining unit. In that case, the Board ruled that no real question concerning representation existed, in that the Retail Clerks had no "colorable claim" to represent snack bar employees.

In this case, it is asserted that there is no real question of representation in that no other Union seeks to represent snack bar employees, and therefore, the principles set forth by the Seventh Circuit in *Malleable* apply. This is a case where the Retail Clerks did in fact represent a majority of employees, including snack bar employees, in the appropriate unit. Since this is not a representation case where the prospective rights of the employees are involved, respondent Union and respondent Council were proceeding in accord with the principles of *Malleable* in applying the colective bargaining agreement to all employees which that agreement purported to cover.

While this statutory scheme does afford an incumbent Union an advantage over potential rivals in the absence of a real question of representation, as in the instant case, "the Board may not lawfully dissipate that

advantage." *NLRB v. Illinois Malleable Iron Co., supra, Teamsters Local v. NLRB,* 365 U.S. 667, 675-675, 47 LRRM 2906. By attempting to prohibit the inclusion of what may become a nonconsenting minority in the appropriate larger unit before a real question concerning representation has been raised, the Board, to quote the Court in *Malleable,* is seeking "to refashion the statutory scheme."

Contrary to the assertion of the Board, it is clear that this is not a situation where an Employer has concluded a collective bargaining agreement with a minority Union as was the case in *International Ladies' Garment Workers' Union v. NLRB,* 280 F. 2d 616, 620, aff. 366 U.S. 731. On the contrary, this is a case where the Retail Clerks Union represented a majority of employees in the appropriate unit, and a valid collective bargaining agreement, setting forth the terms and conditions of employment, was given effect by the parties to the contract. No other labor organization has sought or seeks to represent these snack bar employees; hence, no real question of representation exists herein.

Conclusion.

Therefore, the principles set forth in *Malleable,* are applicable, and for that reason the petition for enforcement of the Board's order should be denied.

Respectfully submitted,

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Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Jack M. Newman

APPENDIX A.

Section 9(c) National Labor Relations Act.

Sec. (c)(1) Wherever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a):

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 10(c).

(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this Act in any election conducted within twelve months after the commencement of the strike. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) the extent to which the employees have organized shall not be controlling.